Supreme Court, U.S.
FILED
JAN 12 2001
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(2)

No. 00-758

IN THE
Supreme Court of the United States

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

MARIA A. GREGORY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION

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January 12, 2001

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QUESTION PRESENTED

Whether the Merit Systems Protection Board, in reviewing an agency's disciplinary action against an employee, may rely on a series of prior disciplinary actions when the first in that series has been invalidated in grievance proceedings and when each of the subsequent actions relied on the first and is subject to a pending grievance.

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BRIEF IN OPPOSITION

The United States Postal Service argues that the Federal Circuit erred by embracing a rule prohibiting, in connection with employee discipline pursuant to the Civil Service Reform Act of 1978, reliance on prior disciplinary actions that are the subject of pending grievance proceedings.

Whether the Federal Circuit erred, however, is a question that is not properly before this Court. For one thing, the Postal Service neglected to include its arguments in the brief that it filed in the court of appeals, thereby failing to preserve them for review in this Court. For another thing, on the facts of this case (in which the first of respondent's three prior disciplinary actions was reversed in arbitration and all later disciplinary actions built on that first disciplinary action), the question whether reliance on unarbitrated priors should be permissible is simply not implicated: as the Postal Service

conceded in the court below, the decision of the Merit Systems Protection Board ("MSPB") cannot stand regardless of the answer to that question. And the Postal Service's suggestion that this is the last chance for review is meritless: there is no reason why the Postal Service cannot raise the unarbitrated-priors issue again in a more suitable case.

Even if this case provided a proper vehicle for review, certiorari should still be denied. *First*, the Postal Service's predictions concerning the practical impact of the decision below are vastly overstated. The Federal Circuit's opinion by its terms does not state that agencies may never rely on unresolved priors in imposing disciplinary action — it states only that *the MSPB* may not rely on unresolved priors in sustaining disciplinary action. Moreover, the principle that unarbitrated priors may not be considered in sustaining disciplinary action (which has long been applied by arbitrators) will come into play only in the rare case that reaches the MSPB before all priors have been resolved. *Second*, the Postal Service's claim that the Federal Circuit's rule ignores the presumption of correctness to which final agency action is entitled fundamentally misapprehends the nature of both disciplinary decisions and the grievance process.

Accordingly, the Postal Service's petition for a writ of certiorari should be denied.

STATEMENT

1. In 1985, respondent Maria Gregory accepted a clerical position with the United States Postal Service at the post office in Hinesville, Georgia. *See* MSPB Transcript ("Tr.") 468-69. She became a part-time letter carrier in 1987 and was promoted to full-time regular letter carrier in 1993. *See* Tr. 470. In March 1995, respondent was again promoted to a so-called Letter Technician T-6 — a position above regular letter carrier in which she was responsible for overseeing five

mail routes and delivering the mail when the regularly assigned carriers were unavailable. *See* Pet. App. 15a, 21a, 38a. Respondent simultaneously rose to the rank of shop steward in the local letter carriers' union. *See* Tr. 52. Respondent was known as a model employee. Even the postmaster who ultimately fired respondent acknowledged that, throughout her employ, she had "done a very good job." Tr. 287. A postmaster who had previously supervised her testified that respondent was "one of the best employees she ever had." Pet. App. 39a.

Things changed in 1995. At that time, respondent was sexually harassed by a co-worker. *See* Tr. 474. When respondent complained to her superiors, she found that they were unwilling to do anything more than give the co-worker a slap on the wrist. Indeed, management responded by prohibiting respondent from talking to other letter carriers. *See* Tr. 479-80. Respondent then filed complaints with the Equal Employment Opportunity Commission and other agencies and authorities, which caused relations with her supervisors to become increasingly strained. *See* Tr. 477-81. In later proceedings, there was evidence that, by early 1997, the Hinesville postmaster was looking for ways "to get rid of" respondent, which he viewed as difficult in light of her status as a union steward. *See* Tr. 437-39, 446.

In the spring and summer of 1997, respondent was repeatedly disciplined for minor infractions — even though she had never before been disciplined. *See* Tr. 476. *First*, on April 7, 1997, respondent left work early to take her ill daughter to the doctor. *See* Tr. 486. Although respondent believed that she had received permission to go, her supervisors charged her with insubordination and gave her a letter of warning. *See* Informal Brief and Supplemental Appendix for Respondent United States Postal Service at SA 33a, *Gregory v. United States Postal Service*, No. 00-3123

(Fed. Cir. filed Mar. 17, 2000) ("Postal Service Fed. Cir. Br.").[1] *Second*, on April 18, 1997, some mail that had been misplaced earlier that day turned up in respondent's truck at the end of her route. When respondent reported this to a supervisor, she was told to leave it for delivery by another carrier the next day. Nevertheless, management later charged respondent with intentionally delaying the mail and, relying on the prior letter of warning, suspended her for seven days. *See id.* at SA 33b. And, *third*, respondent was again disciplined for incidents that occurred in July 1997, including allegedly earning overtime without first submitting an overtime-request form (described more fully below). Relying on the prior letter of warning and seven-day suspension, respondent's supervisors suspended her for 14 days. *See id.* at SA 33c-33d.

A fourth and final incident occurred on September 13, 1997. When letter carriers at the beginning of their work day expect that they will need more than the usual eight hours to deliver their route, they are to submit to their supervisor a paper slip (a so-called "Form 3996") requesting either overtime or help from other carriers. *See* Pet. App. 16a; United States Postal Service, *City Delivery Carriers Duties and Responsibilities (Handbook M-41)* at 43-46 (Mar. 1998), *available at* http://www.nalc.org/cau/pdf/manuals/m41.pdf. On the morning of September 13, respondent submitted a Form 3996 that stated that she estimated that, in light of heavy mail volume and other factors, delivering the route that had been assigned to her that day (a route that she had handled only a few times previously, *see*, *e.g.*, Tr. 465-67, 531) would exceed a regular eight-hour work day by three-

[1] This disciplinary action was later vacated by an arbitrator who concluded that respondent was justified in believing that she had permission to leave. *See infra*, p.6.

and-a-half hours. *See* Pet. App. 2a, 17a. Three-and-a-half hours was not substantially more than what respondent had requested (and what her supervisors had approved) on previous occasions. *See*, *e.g.*, Tr. 148-53, 267, 308, 510; Pet. App. 24a n.4.

But respondent's supervisor, William Cox, viewed three-and-a-half hours as being too much. *See* Pet. App. 17a. Cox therefore assigned three hours of work to other carriers and accompanied respondent on the remainder of her route to see for himself why so much time was needed. *See id.* At the end of the day, Cox determined that, taking account of the help from the other carriers, respondent's route had really taken only a little over two hours more than an eight-hour work day. *See id.* at 2a. Thus, Cox determined that, in hindsight, respondent's estimate was off by 1.3 hours, *see id.*, which, in his eyes, was particularly egregious because she had stopped her delivery truck to pick up first-class mail that she had seen lying in the street — something Cox considered a waste of time, *see* Tr. 136-37; Pet. App. 28a.

Although no carrier in Hinesville had previously been disciplined on this ground, *see* Tr. 211-12, 360, Cox concluded that respondent's faulty estimate was cause for severe punishment, *see* Tr. 223-24. Cox reasoned that postal practice was to require letter carriers to be able to estimate their overtime correctly within a 15-minute margin, *see* Tr. 109, 307 — a rule that, oddly, would apparently be violated as much by requesting 45 minutes where 15 minutes suffices as by requesting 3.5 hours where 3 hours suffices. A few days later, Cox sent respondent a notice charging her with failure to perform her duties in a satisfactory manner and proposing that, in light of her three prior disciplines, respondent be fired. *See* Pet. App. 2a. Similarly relying on respondent's previous disciplinary record, a Postal Service Labor Relations Specialist later sustained Cox's proposal. *See*

id. After more than 12 years of dedicated service, respondent had been fired for overestimating by a little over one hour the more than ten hours it took to deliver a route on which she was not the regular carrier.

2. A disciplined postal worker (or her union) may file a grievance pursuant to the applicable collective bargaining agreement. *See* 5 U.S.C. § 7121; *Cornelius v. Nutt*, 472 U.S. 648, 650, 652 (1985). In certain cases (where the employee — like respondent — is a "preference eligible" veteran and where the discipline is serious), the employee also has the option of appealing to the MSPB instead of filing a grievance. *See* 5 U.S.C. § 7513(d); *see also id.* §§ 2108(3), 7121(e)(1), 7511(a)(1); *Royals v. Tisch*, 864 F.2d 1565, 1567 (11th Cir. 1989). Respondent's union filed grievances with respect to each of her first three disciplines, but respondent filed an MSPB appeal with respect to the fourth. The MSPB reviews agency disciplinary actions to ensure that they are "supported by a preponderance of the evidence" and "in accordance with law." 5 U.S.C. § 7701(c)(1)(B) and (2)(C).

After a hearing, an MSPB Administrative Judge rejected respondent's appeal. *See* Pet. App. 13a-43a. Although the Administrative Judge recognized that "a removal for one instance of failure to perform duties satisfactorily may appear unreasonable," *id.* at 37a, the Administrative Judge stated that respondent's prior disciplinary record made termination appropriate, *see id.* at 37a-38a; *see also id.* at 3a, 6a. Respondent then appealed to the full MSPB, but, on October 20, 1999, that body affirmed without opinion. *See id.* at 9a-10a.

On August 28, 1999, a few months before the full MSPB issued its decision (and almost a year after the Administrative Judge's decision), an arbitrator ruled for respondent on the grievance with respect to her first discipline and expunged the letter of warning from her record. *See* Pet. App. 5a.

Respondent, however, was unrepresented by counsel at the time and did not know to bring the arbitrator's decision to the MSPB's attention.

Respondent next appealed to the Federal Circuit, which reviews MSPB decisions for being "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 7703(c)(1). In her *pro se* brief, respondent argued that, because her first discipline (the letter of warning) had been overturned by an arbitrator, her removal was unlawful because "the progression of discipline no longer exists." Informal Brief of Petitioner Maria A. Gregory at [6], *Gregory v. United States Postal Service*, No. 00-3123 (Fed. Cir. filed Feb. 8, 2000); *see id.* at [2] ("no progression exists"). Respondent attached a copy of the arbitrator's award to her brief. *See id.* App. D. Respondent also argued that the MSPB had erred by relying on "prior unarbitrated suspensions." *Id.* at [2]. In its brief, the Postal Service did not respond to the merits of respondent's arguments, arguing only that respondent had waived them by neglecting to raise them before the MSPB. *See* Postal Service Fed. Cir. Br. at 17.[2]

In a unanimous decision, the Federal Circuit held that respondent's removal could not stand. In its opinion, it reasoned that, although "[t]here is no doubt that prior disciplinary actions are an important factor when considering whether a particular penalty is reasonable under given

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[2] As the Postal Service later acknowledged: "On appeal to this Court, Ms. Gregory, appearing *pro se*, provided the Court with a copy of the arbitrator's decision. The Postal Service argued that consideration of this information for the first time on appeal was improper, citing *Sanders v. United States Postal Service*, 801 F.2d 1328, 1331-32 (Fed. Cir. 1986)." Petition for Rehearing of the Court's Opinion Dated May 15, 2000, at 4, *Gregory v. United States Postal Service*, No. 00-3123 (Fed. Cir. filed June 29, 2000) ("Postal Service Rehearing Petition").

circumstances, . . . there can also be no doubt that a penalty determination cannot be supported by an earlier prior disciplinary action that is subsequently reversed." Pet. App. 6a. Taking "judicial notice of the fact that one of the actions — the May 1997 Letter of Warning — was overturned by an arbitrator in July 1999 and ordered expunged from Ms. Gregory's personnel record," *id.* at 5a, the Court stated:

> In this case, Ms. Gregory had challenged, via grievance proceedings, at least part of the prior disciplinary history that was relied upon by the Postal Service and Board in determining the reasonableness of the penalty. At the time of the Board decision, at least, it appears that these challenges were pending. If the grievances were sustained and the prior actions ordered expunged — as, indeed, happened in at least one instance in this very case — the foundation of the Board's [analysis pursuant to *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981),] would be compromised. Accordingly, we hold that, as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits.

Id. at 7a. Finding that the MSPB had accordingly "abused its discretion," the court of appeals held that "the Board's determination that the penalty of removal was reasonable must be set aside." *Id.*

Represented by numerous high-ranking Department of Justice attorneys who had not previously made an appearance, the Postal Service then filed a petition for rehearing — though not a petition for rehearing en banc. In that petition, the Postal Service challenged (what it termed) "the panel's *apparent* holding that a final agency decision, still pending review, is so inherently unreliable that it may not be considered by the agency or the board in selecting the appropriate penalty for a subsequent adverse action." Postal

Service Rehearing Petition at 5 (emphasis added); *see also id.* at 8 ("apparent holding"); *id.* at 9 ("the Court's decision appears to hold"); *id.* at 11 ("[t]he Court's broad apparent holding"). According to the Postal Service, the Federal Circuit's "apparent holding" ran counter both to the general administrative-law principle that agency decisions must be presumed valid until reversed and to specific MSPB precedent permitting reliance on prior discipline still subject to grievance. *See id.* at 9-14.

Contrary to the position that the Postal Service had taken in its original brief, however, the rehearing petition conceded that the MSPB's decision could not stand. As the rehearing petition put it: "The Postal Service does not contest that portion of the Court's opinion vacating the board's decision and remanding the appeal to the MSPB for further consideration in light of the arbitrator's August 28, 1999 decision. The Postal Service agrees that, on remand, it would be appropriate to exclude the May 13, 1997 suspension letter from consideration in deciding the appropriate penalty." *Id.* at 4-5 n.3. As the petition explained: "Ultimately, the Court is correct that it is appropriate to return this case to the MSPB so that the board may make a determination whether the agency would have taken the same action based upon Ms. Gregory's two remaining disciplinary actions. . . . In making that determination, the board is free to consider argument from Ms. Gregory that the two remaining, previous disciplinary actions also should not be considered." *Id.* at 7 & n.5.

The court of appeals denied the Postal Service's rehearing petition. *See* Pet. App. 44a.

REASONS TO DENY THE WRIT

Because the Federal Circuit has exclusive jurisdiction over appeals from the MSPB, the decision below does not and could not conflict with the decision of any other court of appeals.[3] Although this Court has in rare cases agreed to review Federal Circuit decisions reviewing MSPB decisions,[4] this case is not an appropriate candidate for such treatment. The question whether unarbitrated priors may be considered is not properly presented in this case, and, even if it were, that question would not merit the Court's attention.

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[3] Moreover, the decision below is consistent with a decision of the Second Circuit on review of a district-court decision in a discrimination case. *See Sumner v. United States Postal Service*, 899 F.2d 203, 210 (2d Cir. 1990) ("at least one and possibly two of the six [prior disciplinary actions] should not have been considered, either because they had been expunged from Sumner's employment record or because they were not final").

[4] Saying that "[t]his Court has often recognized that a possible misapplication of the federal civil service laws by the court of appeals is sufficiently important to warrant review," Pet. 7 n.1, the Postal Service implies that this Court routinely accepts MSPB cases for review. In fact, since the Federal Circuit was established in 1982, this Court has done so only four times, and only once in the last 12 years. Moreover, in each of those four instances, there were indicia of certworthiness not present here: one involved an en banc decision (*Cornelius v. Nutt*, 472 U.S. 648 (1985)), one involved a split panel (*Department of Navy v. Egan*, 484 U.S. 518 (1988)), one involved a denial of rehearing en banc in a case in which the Government had appealed from an MSPB decision in the face of Federal Circuit precedent (*LaChance v. Erickson*, 522 U.S. 262 (1998), more fully described *infra*, p.15), and one involved a denial of rehearing en banc resulting in an opinion (*United States v. Fausto*, 484 U.S. 439 (1988)).

I. THE QUESTION WHETHER UNARBITRATED PRIORS MAY BE CONSIDERED IS NOT PROPERLY PRESENTED.

A. There are two reasons why this case is a poor vehicle for addressing the question whether consideration of unarbitrated priors is permissible.

First, the Postal Service failed to preserve the issue below. When respondent argued in her Federal Circuit brief that the MSPB had erred by relying on unarbitrated priors, the Postal Service did not respond by arguing what it so elaborately argues now — that the law *permits* reliance on unarbitrated prior disciplinary actions. *See supra*, p.7. Instead, the Postal Service argued only that respondent had failed properly to raise that issue before the MSPB. *See id.* Although the Postal Service did challenge respondent's argument in its petition for rehearing, the Federal Circuit (like most other circuits) has long held that a losing appellee will not be heard to make legal arguments for the first time in a petition for rehearing. *See Pentax Corp. v. Robison*, 135 F.3d 760, 762 (Fed. Cir. 1998) ("we decline to address the government's new theory raised for the first time in its petition for rehearing"). As this Court stated only recently in another case arising from the Federal Circuit, "issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts." *Nelson v. Adams USA, Inc.*, 120 S. Ct. 1579, 1586 (2000).

Second, the question whether reliance on unarbitrated priors is permissible is not implicated on the facts of this case. Of the three prior disciplinary actions that were the subject of pending grievances, the first (to which this brief shall refer as "Case 1") was set aside by an arbitrator. Although the petition is silent on this point, the Postal Service in the court below conceded that, because the MSPB relied on Case 1 in determining the punishment in the instant matter ("Case 4"),

the MSPB's decision cannot stand: the MSPB must make a new decision without relying on Case 1. *See supra*, p.9; *see also Jones v. Department of Air Force*, 24 M.S.P.R. 429, 431 (1984). Indeed, the Postal Service below conceded that, "[i]n making that determination, the board is free to consider argument from Ms. Gregory that the two remaining, previous disciplinary actions ["Cases 2 and 3"] also should not be considered." Postal Service Rehearing Petition at 7 n.5. That was a wise concession. The disciplinary actions in Cases 2 and 3 also relied on Case 1. *See supra*, p.4. Thus, relying on Cases 2 and 3 is tantamount to relying on Case 1.

The outcome in this case therefore does not turn on the question whether the MSPB may consider unarbitrated priors. Whether one applies the Federal Circuit's rule (under which the MSPB may consider neither vacated priors nor priors still subject to grievance) or the Postal Service's proposed rule (under which the MSPB may not consider vacated priors but is free to rely on priors still subject to grievance), the outcome is the same: the MSPB's decision cannot stand, and Cases 1, 2, and 3 may not be considered in determining the punishment in Case 4.[5]

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[5] It might be argued that the debate between the two rules is not entirely academic in that, under the Postal Service's proposed rule, the MSPB may be entitled to rely at least on the findings of infraction in Cases 2 and 3 — even if not on the penalty imposed in those cases. The premise of this argument will likely turn out to be incorrect. As the Postal Service has conceded, respondent on remand will be entitled to relitigate the merits of Cases 2 and 3. *See supra*, p.9. Respondent has never received a hearing on the merits of Cases 2 and 3: the Postal Service had her grievances dismissed as inarbitrable on the theory that, after her removal was upheld by the full MSPB, she was no longer entitled to access to the grievance process. *See infra*, p.19 n.12. Thus, respondent has not yet been "given an opportunity to dispute the action before a higher authority," Pet. 11; *see* Pet. 13, which, under long-standing MSPB precedent, entitles her to *de novo* review of Cases 2 and 3 within the context of Case 4, *see Bolling v. Department of Air Force*, 8 M.S.P.B. 658, 659 (1981).

If it were to grant certiorari, then, the Court would likely find it unnecessary to decide whether the MSPB may ever rely on priors still subject to an unresolved grievance. *See, e.g., Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 275-76 (1992) ("Given what we have said in Parts II and III, our discussion of the issue [on which the Court granted certiorari] would be unnecessary to the resolution of this case."); *Siegert v. Gilley*, 500 U.S. 226, 227 (1991) (declining to reach issue on which Court had granted certiorari because "petitioner's claim failed at an analytically earlier stage of the inquiry"). Indeed, if the Court were to address that question, its decision would to that extent arguably constitute *dictum* and not bind the Court (or even the Federal Circuit) in later cases. *See, e.g., Maryland v. Wilson*, 519 U.S. 408, 412-13 (1997); *Evans Cooling Sys., Inc. v. General Motors Corp.*, 125 F.3d 1448, 1452-53 (Fed. Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998).

In any event, because the punishment in Case 4 was already uncommonly harsh before Case 1 was overturned, *see* Pet. App. 6a, 37a, the removal penalty plainly cannot stand without Case 1. As reflected in this case, the progression of discipline used by the Postal Service appears to be (1) letter of warning, (2) 7-day suspension, (3) 14-day suspension, and (4) removal. A removal for only three minor infractions would thus be excessive. Accordingly, even if it were to consider Cases 2 and 3, the MSPB would no doubt mitigate respondent's punishment to, say, a 14-day suspension. *Cf. Hagmeyer* v. *Department of Treasury*, 757 F.2d 1281, 1285 (Fed. Cir. 1985); *Lopez v. Department of Justice*, 55 M.S.P.R. 644, 646-47 (1992); *Jones*, 24 M.S.P.R. at 431; *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313, 330-31, 341 (1981); *The Common Law of the Workplace: The Views of Arbitrators* 171-75 (Theodore J. St. Antoine ed., 1998). Thus, Cases 2 and 3 could at most make a difference of two weeks' worth of suspension. Within the context of this case (respondent was removed in 1997), that is a trifle.

B. While this case is thus a poor vehicle for review, the Postal Service in effect suggests that the Court should lower the standards governing certiorari because the question whether the MSPB is entitled to consider unarbitrated priors is unlikely to arise again. This is so, the Postal Service contends, because the MSPB will likely follow the Federal Circuit's rule and because government agencies "d[o] not have an automatic right of appeal from adverse MSPB decisions." Pet. 6-7.

That argument lacks substance. It is true that the Government does not have an appeal to the Federal Circuit as of right: that court has discretionary jurisdiction over government appeals from MSPB decisions similar to this Court's certiorari jurisdiction over court of appeals decisions. *See* 5 U.S.C. § 7703(d); *LaChance v. Devall*, 178 F.3d 1246, 1249 (Fed. Cir. 1999); *see also* 5 U.S.C. § 7701(d)(1); 5 C.F.R. §§ 1201.114, 1201.119. But that will hardly keep the issue from arising again: all the Government needs to do is file a request for review in the Federal Circuit before filing one here.[6]

In fact, there is evidence that the Postal Service is already preparing to do just that. As noted above, the Postal Service's rehearing petition consistently described the decision below as containing only an "apparent holding." *Supra*, pp. 8-9. Evidently, the Postal Service is paving the way for an argument in a later case to the effect that the rule announced below is not binding on other panels — whether on the theory that, because this case involves a *successful* grievance, the language in the Federal Circuit's opinion about *pending* grievances was unnecessary to the decision; on the

[6] Although the Federal Circuit rarely denies the Government's petitions for review, the Government plainly can seek review in this Court if the Federal Circuit does so. *See* 28 U.S.C. § 1254(1).

theory that, given the Postal Service's failure to make its arguments below, future panels of the Federal Circuit are free to disregard the decision; or on some other theory still.[7]

That strategy would hardly be unprecedented. For example, confronted with an adverse Federal Circuit ruling in *Grubka v. Department of Treasury*, 858 F.2d 1570 (Fed. Cir. 1988), the Government did not immediately seek certiorari. Rather, it filed a request for review of another MSPB decision, which the Federal Circuit granted. *See King v. Walsh*, Docket Nos. 95-3593 & 95-3160, 1995 U.S. App. LEXIS 22222 (Fed. Cir. July 27, 1995). In its merits briefs, the Government then argued that the *Grubka* rule constituted *dictum*, both because "the court's reasons as stated in its opinion" were not "essential to the decision in question" and because the issue had not been "fully briefed to the court." *King v. Erickson*, 89 F.3d 1575, 1582 (Fed. Cir. 1996). Only after the Federal Circuit rejected those arguments did the Government seek review in this Court. *See LaChance v. Erickson*, 522 U.S. 262 (1998).

No reason comes to mind why the Postal Service should not be required to follow the same path here. So long as the Postal Service still has available to it in the Federal Circuit an avenue that may accomplish its objectives, there simply is no pressing reason to consume the scarce resources of this Court. There will be time enough to entertain the Postal Service's arguments if and when that avenue proves unrewarding.

[7] *See, e.g., Bennis v. Michigan*, 516 U.S. 442, 450 (1996) ("[I]t is to the holdings of our cases, rather than their dicta, that we must attend.") (internal quotation marks omitted); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 394 (1995) (where point was "uncontested by the parties" in a prior case, statements did "not bind" the Court).

II. EVEN IF THE QUESTION WHETHER UNARBITRATED PRIORS MAY BE CONSIDERED WERE PROPERLY PRESENTED, IT WOULD NOT MERIT REVIEW.

According to the Postal Service, this Court's intervention is warranted because the decision below will make reliance on prior disciplinary actions practically impossible not only for the MSPB but also for all government agencies whose personnel decisions are reviewed by the MSPB. The Postal Service argues that grievances usually take years to resolve, and that the Federal Circuit's rule thus in effect allows employees to insulate prior disciplinary actions from all consideration simply by filing a (possibly frivolous) grievance. *See* Pet. 6, 16-18. And on the merits, the Postal Service argues, the Federal Circuit's rule ignores the presumption of correctness to which final agency action is entitled. *See* Pet. 6, 11-12. Each of these arguments, however, lacks merit.

A. The Postal Service's predictions concerning the practical impact of the decision below (Pet. 14-18) are greatly exaggerated. Contrary to the Postal Service's suggestion, *see* Pet. 6, 15-17, the terms of the Federal Circuit's opinion do not state that agencies may never rely on unresolved priors in imposing disciplinary action; the court of appeals' opinion states only that *the MSPB* may not rely on unresolved priors in sustaining disciplinary action.[8] The opinion does not state that the Federal Circuit would fault the MSPB for sustaining an agency's disciplinary action in reliance on priors that,

[8] *See* Pet. App. 7a ("At the time of the Board decision, at least, it appears that these challenges were pending."); *id.* ("If the grievances were sustained . . . the foundation of the Board's *Douglas* analysis would be compromised."); *id.* ("[T]he Board abused its discretion in relying upon them.").

although still subject to grievance when the agency acted, had become final by the time the MSPB decided. The Federal Circuit's rule can thus be viewed as nothing more than a principle governing the scheduling of appeals: the MSPB should not decide a case until relevant priors have been arbitrated.[9]

And even that rule — which, contrary to the Postal Service's argument (*see* Pet. 9-14), is entirely consistent with the MSPB's *Douglas/Bolling/Jones* jurisprudence — will likely not come into play in many cases. It is a matter of simple logic that, in the normal course, challenges to prior disciplinary actions will be resolved sooner than challenges to later ones, so that grievances concerning priors will usually have been resolved by the time the MSPB is ready to decide. Indeed, the collective bargaining agreement here in question calls for an arbitration decision in well under one year.[10] Although the grievance process no doubt sometimes experiences delay, there is no reason to believe that grievance

[9] This rule, under which what matters is the state of affairs in existence at the time of the MSPB's (not the agency's) decision, is entirely consistent with the MSPB's place in the statutory scheme. The MSPB's "role in relation to employing agencies" cannot "be assimilated to that of a reviewing federal court." *Douglas*, 5 M.S.P.B. at 316. The MSPB "is not a Court of Appeals but rather is itself an administrative establishment within the Executive Branch." *Id.* at 317 (internal quotation marks omitted). Thus, "from an appellate court's standpoint, [the MSPB's] action is itself part of the 'agency action' reviewed." *Id.* at 326.

[10] *See* Agreement Between National Association of Letter Carriers, AFL-CIO, and U.S. Postal Service (1994-1998), Arts. 15.2, 15.4. The agreement currently in force, which is identical in most respects to the 1994-1998 agreement, can be found at http://www.nalc.org/cau/index.html. That Agreement, incidentally, introduced an even more fast-paced arbitration procedure. *See* 1998 Agreement at 186-88.

proceedings usually proceed at a more leisurely pace than MSPB proceedings.

To the contrary, the MSPB took almost two years to decide this case, and that appears to be par for the course. *See* Office of Pol'y and Evaluation, MSPB, *Issues of Merit* (Dec. 1999), *available at* http://www.mspb.gov/studies/99decnws.pdf. Thus, it will likely be the rare case in which a later-initiated MSPB proceeding leapfrogs an earlier-initiated grievance proceeding. *Cf. Arbitration Between National Ass'n of Letter Carriers and United States Postal Service*, Case No. E94 N-4E-D 96075418, Analysis and Award at 13 (Nat'l Arbit. Panel Apr. 19, 1999) (per Carlton J. Snow) ("The parties concede that the situation in dispute arises rarely and that underlying grievances generally do not remain unresolved at the time of a removal hearing.").[11] Indeed, this case may be one of first impression: this is the first case involving leap-frogging to have arisen in the Federal Circuit, and it is not clear that the facts of any of the MSPB cases to which the Postal Service points (*see* Pet. 12 & n.7) involved actual leap-frogging.

The Postal Service nevertheless suggests that grievance proceedings take longer to resolve than MSPB proceedings, but its only evidence is the assertion that "[r]espondent's grievances challenging the June 1997 and August 1997 suspensions still are pending after more than three years." Pet. 16 n.8. There is considerable irony in that assertion. That respondent's grievances are still pending is due entirely to the Postal Service's own delay. Throughout this case, the apparent strategy of the Postal Service (evidently fearing defeat in the grievance proceedings concerning the priors) has been to have the MSPB proceeding leap-frog the pending

[11] Copies of this and another arbitral decision cited in this brief (*see infra*, p.19) have been lodged with the Clerk of this Court.

grievance proceedings — thereby enabling the Postal Service first to rely on the priors in seeking MSPB affirmance of the removal and then to insulate the priors from review on the theory that, once respondent's removal had been affirmed, she was no longer an employee and therefore no longer entitled to participate in the grievance process.[12]

The immediate practical effect of the decision below is thus limited to making gamesmanship of this nature unrewarding. And even that salutary consequence is nothing new. In grievance arbitration, it has long been the settled rule that arbitrators may not sustain disciplinary actions in reliance on unresolved priors. *See Arbitration in the Matter of United States Postal Service and National Post Office Mail Handlers*, Grievance No. MC-S-0874-D, at 7 (June 18, 1977) (per Paul J. Fasser, Jr.). That rule has hardly resulted in any of the horribles that the Postal Service now parades around. *See* Pet. 14-18. Its only noticeable effect has been to encourage

[12] The arbitrations were initially placed in abeyance pending the MSPB appeal, but, in April 1998, the union requested that the cases proceed, and they were set for a July 1998 expedited arbitration hearing. The Postal Service responded by referring the cases to non-expedited arbitration. When that did not buy enough time, the Postal Service twice (first in August 1998 and again in December 1998) invoked the so-called "Step 4" grievance procedure. *See* Agreement Art. 15.1, Step 4. Although that could not prevent a hearing in Case 1 (which took place in July 1999 and resulted in the August 1999 arbitrator's decision, *see supra*, p.6), it did succeed in forestalling hearings in Cases 2 and 3, which had been scheduled for November 1999. When the full MSPB issued its decision in October 1999, the Postal Service refused to proceed with Cases 2 and 3. In the wake of respondent's victory in the Federal Circuit, the union has sought to revive those cases, but to date they have not progressed to arbitral hearings. (Not all of the facts recounted in this footnote are in the record of this case, but neither is the Postal Service's statement that "[r]espondent's grievances challenging the June 1997 and August 1997 suspensions still are pending after more than three years." Pet. 16 n.8.)

arbitrators to schedule proceedings in the proper chronological order. *See Arbitration Between National Ass'n of Letter Carriers and United States Postal Service*, Case No. E94 N-4E-D 96075418, Analysis and Award at 9-10, 16-17 (Nat'l Arbit. Panel Apr. 19, 1999) (per Carlton J. Snow).

Besides, employees typically could not insulate priors by filing frivolous grievances. Under most collective bargaining agreements, only the union can file a grievance. *See* 5 U.S.C. § 7121(b)(1)(C); *cf. Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976).[13] If the Postal Service means to suggest that civil servants' unions will routinely help employees in carrying out frivolous delaying tactics, that suggestion is unsupported. As this Court has recognized, unions perform a beneficial "screening" function in the grievance process that "avoids processing of frivolous claims." *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 51 (1979).

B. The Postal Service has also failed to carry its burden of showing that the Federal Circuit's rule is mistaken — let alone so mistaken as to be of concern to this Court in the absence of a conflict of authority. The decision below sensibly obviates the need to reopen MSPB proceedings that arises when relevant priors are vacated after the MSPB issues its decision. *See* Pet. 13-14. The Federal Circuit's rule thus not only prevents procedural gamesmanship but also conserves administrative resources.

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[13] For example, the collective bargaining agreement between the Postal Service and respondent's union provides for a four-step grievance procedure. Of those four steps, individual grievants can invoke only the first, which is concluded within 20 days. *See* Agreement Art. 15.1, Step 1. Each of the later steps can be invoked only by the union. *See id.* Step 1(d), Step 2(h), Step 3(d), Step 4(a).

The Postal Service nevertheless argues that a government manager's disciplinary action should be analogized to final agency action, which, it says, reviewing courts give a presumption of correctness until reversed. *See* Pet. 11-12 & n.6. But disciplinary action is not final agency action. *See supra*, p.17 n.9. Accordingly, the presumption of correctness that the Postal Service invokes is unknown in the public-employment field. It is not applied in grievance arbitration. *See supra*, p.19. And, although the Postal Service implies otherwise, it is not applied by the MSPB.[14] To the contrary, the MSPB has long allowed extensive relitigation of prior disciplinary actions: it reviews priors always under a "clearly erroneous" standard and in many cases under a "de novo" standard. *See Bolling*, 8 M.S.P.B. at 659-60; Pet. 4, 11, 13; Pet. App. 37a.

This is not surprising. Where a grievance procedure exists, the agency has through collective bargaining voluntarily relinquished rights and powers that its managers might otherwise have had. *See* 5 U.S.C. § 7106(b); *Cornelius*, 472 U.S. at 652 ("Even matters reserved to agency-management discretion, such as discipline, are subject to negotiation concerning the procedures that management officials will observe in exercising their authority."). And the result of that bargaining is invariably incompatible with the presumption of correctness that is given to final agency decisions subject to judicial review.

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[14] By quoting from *Hubbard v. United States Postal Service*, 32 M.S.P.R. 505 (1987), the Postal Service implies that the presumption of correctness is the rationale behind the MSPB precedent to which it points. *See* Pet. 12. In fact, the language quoted from *Hubbard* addressed the standard for recusal of an MSPB Administrative Judge, *see* 32 M.S.P.R. at 508 — something entirely distinct from the prior-discipline issue that happened to be addressed elsewhere in the same opinion.

Unlike final agency decisions taken by impartial administrators who have every incentive to "get it right the first time," disciplinary decisions subject to grievance are taken (often in an emotionally charged atmosphere) by managers who have a strong incentive to get it *wrong* the first time. It is the very nature of the grievance process that both sides are expected to settle their disputes.[15] Knowing that they are expected to bargain down most grievances, management has a natural incentive to "overcharge." Similarly, a grievance cannot credibly be likened to a judicial appeal. Where final agency action is the subject of judicial review, the pendency of the appeal signifies only the appellant's self-interested (and perhaps entirely unfounded) hopes. In contrast, the pendency of a grievance indicates that union officials deem the challenged disciplinary decision mistaken and the challenge sufficiently meritorious to be of interest to all employees. *See supra*, p.20.

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[15] *See, e.g.*, Agreement Art. 15.3.A ("The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 12, 2001

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